In addition to these "substantive" rulings, Petitioners also seek review of the District Court's decision[6] requiring them to return a privileged document that was inadvertently produced during discovery. The facts relating to this issue are also undisputed and, from an examination of the document, the District Court found that it was within the scope of the attorney-client privilege, that the privilege had not been waived, and that the document was not connected to any crime or fraud that would give rise to an exception to the privilege. Petitioners cite no facts that in any way alter those conclusions.

Although Appellants' *Petition* is littered with misstatements of fact, particularly with regard to the nature and extent of Petitioners' exposure and the alleged deficiencies in Respondents' safety programs, *none* of those assertions impacts the determination of the *Questions* here presented for review; accordingly, Respondents see no need to further "point out" Petitioners' misstatements, S.Ct.R. 15(2). In each instance, the courts below ruled as a matter of law based on uncontroverted facts.[7] Those facts are clearly dispositive of all of the *Questions* now presented to this Court.

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6. Affirmed by the Court of Appeals.

7. Or, in the case of Appellants' alleged chromosomal changes, claims assumed to be true.

REASONS FOR DENYING THE PETITION

I. Introduction

In this case, Petitioners seek to maintain an action in tort for a class of individuals who, although arguably exposed to low levels of radiation[8] are not injured or ill, demonstrate no present physical symptoms of disease and, even according to their own experts, may or may not suffer from a related health problem in the future. Both Kentucky law and the *Price-Anderson Act* preclude recovery for such premature claims.

Although Petitioners present eight separate *Questions* for review, the case involves, and the courts below considered, four basic issues: (1) whether Petitioners' purported symptomless subcellular changes constitute a sufficient "present physical injury" to state a cause of action under Kentucky law; (2) whether Petitioners presented any evidence of Respondents' "deliberate intention to produce injury or death", so as to bring their claims within the exception to employers' immunity from physical injury suits by employees under Kentucky workers' compensation law; (3) whether there is any basis for a claim by Petitioners against Respondents under *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics* and its progeny; and finally (4) whether the District Court erred in ordering the return of a document protected from disclosure by the attorney-client privilege. None of these issues demonstrates "compelling reasons" for a writ of certiorari, as required by S.Ct.R. 10.

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8. For purposes of summary judgment, the courts below assumed that Plaintiffs were exposed to some form of radiation during their employment at PGDP. However, the records fail to establish any such potentially injurious exposure.

II. Contrary to Petitioners' claims, the rulings below are not in conflict with precedent of this Court or the Kentucky Supreme Court with regard to the requirement that Plaintiffs establish "a present physical injury" in order to recover in tort.

A. Both the District Court and the Court of Appeals properly applied Kentucky law to the undisputed facts in this case.

The *Price-Anderson Act* ("*Price-Anderson*") grants original jurisdiction to federal courts to adjudicate "any public liability action arising out of or resulting from a nuclear incident". 42 U.S.C. § 2210(n)(2). All parties agree that this case represents a "public liability action" under that *Act*, and that "a claim growing out of [an alleged] nuclear incident is compensable under the terms of the Price-Anderson Act or it is not compensable at all." *In re TMI Litigation Cases Consolidated*, 940 F.2d 832, 854 (3d Cir. 1991), *cert. denied*, 503 U.S. 906 (1992). Under such circumstances, it is incumbent upon the federal court to "derive from the relevant state law" the legal principles applicable to the action. *See Nieman v. NLO, Inc.*, 108 F.3d 1546, 1553 (6th Cir. 1997); *O'Conner v. Commonwealth Edison Co.*, 13 F.3d 1090, 1105 (7th Cir. 1994), *cert. denied*, 512 U.S. 1222 (1994). In this case, there is clear Kentucky precedent[9] from which to "derive the relevant state law" with regard to each of the issues presented. Applying that precedent to the undisputed facts, both the District Court and the Court of Appeals held that each and all of Petitioner' claims failed as a *matter of law*.

Under Kentucky law, "a cause of action in tort requires a present physical injury to the plaintiff" that "actually . . . produces loss or damage", and "mere ingestion of a toxic substance does not constitute sufficient physical harm upon

9. Or in the case of Petitioners' *Bivens* claims, clear precedent from this Court.

which to base a claim for damages." *Wood v. Wyeth-Ayerst Laboratories*, 82 S.W.3d 849, 852, 856 (Ky. 2002), quoting in part *Capital Holding Co. v. Bailey*, 873 S.W.2d 187, 192 (Ky. 1994). In the present case, Petitioners have no "physical injuries" as that phrase has traditionally been defined and commonly understood. Each specifically denied that he or she suffered from *any* physical injury, condition, or disease attributed to radiation exposure. Nevertheless, they claim that exposure to radiation is *per se* a physical injury, because it results in symptomless subcellular changes in DNA in some exposed cells.

Both the District Court and the Court of Appeals rejected that argument as totally inconsistent with established Kentucky law. As the Court of Appeals noted:

> Although the plaintiffs contend that they have real and concrete physical injuries, the evidence shows that their DNA damage is harmful only insofar as it is predictive of future disease . . . Indeed, plaintiff Charles Ramsey testified that his main fear was not present injury, but he was "worried to death what [the radiation] is doing to me . . . 10, 20 years from now." In this sense, the plaintiffs are similarly situated to the plaintiffs in *Wood* and *Capital Holding*, whose primary claims were that their exposure to toxic substances had created an increased risk of disease. Those claims were dismissed by the Kentucky Supreme Court because they were premature . . . In sum, Kentucky caselaw provides sufficient guidance for us to conclude that, if this case were to be decided in that state's courts, the public policy considerations and the lack of any present physical illness would require the grant of summary judgment in favor of the defendants.

402 F.3d at 622 (citations omitted).

This determination in no way conflicts with either *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984) or the clear precedents of the Kentucky Supreme Court. The issue in *Silkwood* involved whether the imposition of punitive damages amounted to impermissible state regulation under *Price-Anderson*. In answering that question in the negative, this Court merely reiterated that "state law remedies" (provided here by Kentucky law) are "available to those *injured* by nuclear incidents". 464 U.S. at 256 (emphasis added). Neither the courts below nor Respondents herein have suggested otherwise. In affirming the District Court's grant of summary judgment, the Court of Appeals did nothing more than apply settled Kentucky law. Moreover, the cited "policy considerations" that Petitioners now assail were *not* the creation of the Court of Appeals, but rather were taken directly from decisions of the Kentucky Supreme Court.[10]

As was their mandate under *Price-Anderson*, both the District Court and the Court of Appeals derived the applicable legal principles "from the relevant state law", *Nieman v. NLO, Inc.*, *supra*, and determined that Petitioners failed to state a claim under that law. They were clearly correct in so finding, and there is no conflict herein.

B. The Courts properly required a "present physical injury".

Petitioners next assert that the District Court and Court of Appeals misapplied *Wood* and *Capital Holding* because the plaintiffs in those cases did not offer evidence of any subcellular changes following the involved toxic exposure.

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10. Petitioners' quotation of the relevant portion of the Court of Appeals decision (*Petition* at p. 11) *omits*, after the phase "public policy considerations", the Sixth Circuit's further statement: ". . . many of which have already been articulated by the Kentucky courts". 402 F.3d at 621.

However, the Kentucky Supreme Court's opinion in *Wood* clearly indicates that such evidence would have made no difference. Likewise, far from being in conflict with this Court's decision in *Metro-North Commuter R.R. Co. v. Buckley*, 521 U.S. 424 (1997) (which denied recovery to a Plaintiff even though, as described by the Court of Appeals, "needle-like asbestos fibers . . . lodged in [plaintiff's] lungs" and "cause[d] subclinical changes" that "could create grave health problems later in life,"[11]), both the Kentucky Supreme Court in *Wood* and the federal courts below cited *Metro-North* as "persuasive" that such subclinical changes do *not* constitute a present physical injury.

The physical injury requirement prevents "the systemic harms that can accompany unlimited and unpredictable liability." *Wood*, *supra*, 82 S.W.2d at 857, *quoting Metro-North*, *supra*, 521 U.S. at 442. "All persons are exposed to radiation in their day to day existence." *In re TMI*, 927 F. Supp. 834, 840 (M.D. Pa. 1996), *aff'd in part*, 193 F.3d 613 (3d Cir. 1999), *cert. denied*, 530 U.S. 1225 (2000). Petitioners' alleged subcellular "physical injury" can result from exposure to any type of radiation, natural or otherwise, and "a single radiation track . . . can cause unrepaired or misrepaired DNA lesions and chromosomal aberrations." *City of Waukesha v. EPA*, 320 F.3d 228, 244 (D.C. Cir. 2003). Accordingly, if Petitioners' definition of "physical injury" is correct, every person in this country is "physically injured" every moment of their lives, and can assert tort claims against every extant source of radiation exposures ranging from manufacturers of television sets and ceramic dinnerware to airlines, farmers, and dentists, even if they never suffer any illness, disease, or other physical harm. Kentucky wisely precludes these kinds of claims by requiring an *actual* physical injury, manifested by *actual* symptoms, that creates a "*harmful change*". *See Capital Holding*, 873 S.W.2d at 194.

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11. 79 F.3d at 1341-43.

Despite Petitioners' protestations to the contrary, their experts did not and could not testify that any of the alleged subcellular changes they observed would likely result in cancer or any other disease. Summary judgment dismissing Petitioners' tort claims for failure to satisfy Kentucky's present physical injury requirement was properly granted in this case.

C. Decisions by other Circuits and/or other States are largely irrelevant to the determination herein.

In support of their appeal, Petitioners cite decisions from "other circuits and many district courts", *applying the law of states other than Kentucky*, and argue that the Court of Appeals' decision herein is in conflict with those determinations. What this tortured analysis fails to explain, however, is how any of those decisions is relevant to this case. *Price-Anderson* requires that the federal court derive and apply the legal principles of the state where the alleged harm occurred, here Kentucky. That is precisely what was done by both the District Court and Court of Appeals. Whether those "legal principles" are consistent with or contrary to the laws of other jurisdictions is irrelevant. Where, as here, the state law is clear, it is of no consequence whether "[o]n a national level, the law is extremely unsettled on the issue of whether cellular damage with subclinical effects constitutes a cognizable injury".[12]

D. Price-Anderson mandates the result reached in this case.

Finally, although Plaintiffs' make no mention of it in their *Petition*, *Price-Anderson* specifically limits recovery to "bodily injury, sickness, disease, or death . . . arising out of or resulting from the radioactive . . . properties of source, special nuclear, or by-product material." 42 U.S.C. § 2014(q).

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12. *Petition* at p. 18.

Accordingly, plaintiffs' claims are not cognizable unless and until they sustain "bodily injury, sickness, disease, or death" as a result of their alleged workplace exposure to radiation.

In *In re Berg Litigation*, 293 F. 3d 1127 (9th Cir. 2002), the Court specifically held that plaintiffs' claims of "cellular injury" from alleged excessive exposures to workplace radiation did *not* satisfy the "bodily injury, sickness, or disease" criteria under the *Act*. 294 F.3d at 1133. Moreover, Petitioners' expansive view of the physical injury requirement would open the federal courts to a flood of trivial claims by plaintiffs who have sustained only the kind of subcellular changes that *every* person sustains *every* day through exposures to sunlight, soil, televisions, x-rays, and a host of other substances. The purpose of *Price-Anderson* was "to encourage private sector participation in the beneficial uses of nuclear materials", *In re TMI Litigation*, *supra*, 940 F.2d at 853, and Congress sought to achieve that goal by, *inter alia*, limiting recovery to only those plaintiffs who *actually* sustain bodily injury, sickness or disease. Petitioners have sustained no such injuries in this case, and the decisions below are entirely consistent with the applicable state and federal law.

III. Deliberate intent to harm is an absolute prerequisite to recovery for an intentional tort under Kentucky law.

Kentucky's workers' compensation system provides the exclusive remedy for workplace injuries. KRS § 342.690(1). The "primary purpose" of that statute "is the elimination of common-law actions for personal injuries growing out of industrial operations", *Union Underwear Co. v. Scearce*, 896 S.W.2d 7, 8 (Ky. 1995), *cert. denied*, 516 U.S. 869 (1995), and there is only one exception: "[i]f injury or death results to an employee through the *deliberate intention of his*

employer to produce such injury or death . . ." KRS § 342.610(4) (emphasis added). Despite the fact that they presented no evidence that Respondents *deliberately intended* to inflict the injuries alleged, Petitioners now assert that the courts below "misapplied" the Kentucky law. There simply is no factual or legal basis for this position.

Although Petitioners acknowledge that a half-century of supposed injurious exposure has produced, at most, non-specific chromosomal changes in a few individual workers, they nevertheless maintain that the plethora of Kentucky cases requiring proof of "deliberate intent to harm" are inapplicable because "[n]one of these . . . cases can be compared to the knowing injuries inflicted upon the workers at the PDGP"[13], and ask this Court to create a broader exception to Kentucky's exclusive remedy statute. Petitioners' argument completely ignores the plain language of the Kentucky statute, and has been repeatedly considered and *unanimously* rejected by Kentucky courts.

The language in KRS § 392.690(4) requiring proof of an employer's deliberate intent to injure an employee is "clear and straightforward" and means exactly what it says: "[t]o have deliberate intention, the employer must have determined to injure an employee and used some means appropriate to that end, and there must be a specific intent [to injure]." *Blanton v. Cooper Industries, Inc.*, 99 F. Supp. 2d 797, 803, 805 (E.D. Ky. 2000), *quoting Fryman v. Electric Steam Radiator Corp.*, 277 S.W.2d 25, 27 (Ky. 1955). Likewise, in *Brierly v. Alusuisse Flexible Packaging, Inc.*, 184 F.3d 527, 535 (6th Cir. 1999), *cert. denied*, 528 U.S. 1076 (2000), the Court expressly held that the requisite "deliberate intention" to injure cannot be "inferred" from

13. *Petition* at p. 28.

evidence that the employer acted with knowledge of the danger of injury to its employees:

> [A]s the district court noted, "the statutory standard . . . requires more than implied intent; it requires deliberate intention". . . .

184 F.3d at 535.

Finally, less that a year ago in *Moore v. Environmental Construction Corp.*, 147 S.W.3d 13, 15-16 (Ky. 2004) the Kentucky Supreme Court reiterated that allegations an employer knew of dangerous workplace conditions or exposures are legally insufficient to invoke the intentional tort exception:

> "[D]eliberate intention" [implies] that the employer must have determined to injure an employee and used some means appropriate to that end, and there must be specific intent. The defendant who acts in the belief or consciousness that the act is causing an appreciable risk of harm to another may be negligent, and if the risk is great the conduct may be characterized as reckless or wanton, but it is not an intentional wrong.

The evidence of record does not satisfy the "deliberate intent" exception in KRS § 342.610(4) as a *matter of law*. The courts below were clearly correct in dismissing the tort claims that Petitioners asserted against their employers.

IV. Petitioners have no cognizable *Bivens* claims.

A. *Bivens* applies only to individuals.

Approximately one year after instituting this action, Petitioners filed a new and separate case alleging that Respondents violated their constitutional rights by exposing them to excessive levels of radiation at PGDP.[14] (*See* Class Action Complaint, Jt. App. 139 at para. 39.) Petitioners based this claim on *Bivens v. Six Unknown Named Agents*, *supra.*, which recognized a civil cause of action against *individual* defendants for constitutional violations. (*Id.* at para. 61.) Respondents moved for summary judgment with regard to this claim after this Court held in *Correctional Services Corp. v. Malesko*, 534 U.S. 61 (2001), that such claims are not cognizable against a corporate defendant that performs contractual services for the federal government. The District Court granted the Motion, holding that *Malesko* was "fatal to Plaintiffs' claims" because "*Bivens* claims may not be brought against private corporations under any circumstances."[15]

Undeterred, Petitioners moved the Court to "amend" its ruling and "clarify" that *Malesko* does not bar *Bivens* claims that seek equitable relief rather than damages and, failing that, moved to amend their *Complaint* to assert a *Bivens* claim for unjust enrichment requesting disgorgement of money as a remedy for past alleged constitutional violations. The District Court denied both Motions, and its rulings were affirmed by the Court of Appeals.

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14. That action, styled *Alphonse Rainer, et al. v. Bill Richardson, et al.*, Case No: 5:00-CV-220-M, was subsequently consolidated with this case for "purposes of discovery and, if appropriate trial". *See* **Order of Consolidation**, (Jt. App. 1147).

15. *See* **Memorandum Opinion and Order on Motion to Dismiss *Bivens* Claims,** (Jt. App. 342).

Although Petitioners assail the Court of Appeals' finding that *Price-Anderson* preempts their *Bivens* claims, they cite no legal basis for maintaining those claims against Respondents herein. Respondents are private corporations, not *individual* federal actors, *see Bivens*, 403 U.S. at 395-96, and this Court has repeatedly held that "the purpose of *Bivens* is to defer *the officer*" individually. *See FDIC v. Meyer*, 510 U.S. 471, 485 (1994) (original emphasis). *Malesko* merely reconfirmed that rule when it held that a *Bivens* action cannot be maintained against a *corporation* for its acts as a government contractor:

> *Bivens* from its inception has been based . . . on the deterrence of individual officers who commit unconstitutional acts. . . . With respect to the alleged constitutional deprivation, [plaintiff's] *only remedy lies against the individual. . . .*

534 U.S. at 71 (emphasis added).

Petitioners do not as much as mention *Malesko*; nevertheless they argue that their *Bivens* claims are viable because the alleged constitutional violations purportedly related to "a corporate policy", and/or since the remedies that they seek include "disgorgement of profits"[16]. Neither position has merit.

In *Malesko*, this Court specifically rejected the contention that *Bivens* claims are cognizable against corporations if the constitutional violation is the result of a corporate policy:

> *Bivens* . . . is concerned solely with deterring the unconstitutional acts of individual officers. If deterring the conduct of a policy-making entity

16. *Petition* at p. 26. *See also Questions Presented*, No. 7.

> was the purpose of *Bivens*, then *[FDIC v.] Meyer* [*supra*] would have implied a damages remedy against the [FDIC]. It was, after all, an agency policy that led to Meyer's unconstitutional deprivation. *Meyer*, *supra*, at 473-74. But *Bivens* from its inception has been based not on that premise, but on the deterrence of individual officers. . . .

534 U.S. at 70-71. This Court has "consistently refused to extend *Bivens* liability to any new context or new category of defendants", 534 U.S. at 72, and the courts below properly held such claims are not cognizable against the Respondents in this case.

Petitioners thinly-veiled attempt to rescue their *Bivens* claims by denominating them as "equitable" must suffer a similar fate. Although *Malesko* arguably did not limit the availability of "equitable relief", as the District Court properly observed, that "relief" is limited to "prevent[ing] an entity from acting unconstitutionally":

> The Plaintiffs' "equitable" claim is not for injunctive relief. It does not seek to prevent any ongoing unconstitutional policy or practice. It simply seeks to recover "profits" instead of "damages" under an equitable theory. . . . Plaintiffs' disgorgement claim is clearly more akin to money damages. . . . The "equitable" claim is just a disguised version of their money damages claim and it should be foreclosed for the same reasons set out in *Malesko*.[17]

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17. **Opinion and Order on *Rainer* Plaintiffs Motion to Amend Pleadings** (Jt. App. 366 at 3.)

B. *Price-Anderson* provides an adequate remedial mechanism for Petitioners' claims.

In *Schweiker v. Chilicky*, 487 U.S. 412, 423 (1988) this Court held that where Congress provides what it considers "adequate remedial mechanisms for constitutional violations", there is no basis for *Bivens* claim. *See also Bush v. Lucas*, 462 U.S. 367 (1983). After reviewing the legislative history behind *Price-Anderson*, the Court of Appeals found that Congress "indisputably intended for the Act to be the primary remedial mechanism for claims arising out of 'nuclear incidents'". 402 F.3d at 12.

Petitioners cite no reasons why the comprehensive remedial scheme provided by *Price-Anderson* is not "adequate" to address their claims. Moreover, they acknowledge that Congress intended the act to cover "*any* legal liability arising out of or resulting from a nuclear incident" 42 U.S.C. § 2014(w) (emphasis added), and that such claims must be made under *Price-Anderson* . . . "or not at all". *See Nieman v. NLO, supra*. There is no reviewable issue herein, and the Court of Appeals was clearly correct in dismissing Petitioners' *Bivens* claims.

V. Respondents were entitled to the return of the inadvertently disclosed privileged document.

During the massive discovery proceedings in this action, involving literally thousands of documents, Respondents inadvertently produced a memorandum containing legal advice from a Union Carbide attorney to a Union Carbide employee. Paragraph 8 of the parties' **Agreed Protective Order** (Jt. App. 1129) specifically provided that any privileged documents so produced would be returned, but Petitioners claimed that the document was not privileged and refused to return it. The District Court granted Appellees' *Motion to Compel* the return of the document, holding that it was clearly privileged under state and

federal law and that the privilege had not been waived. The Court of Appeals affirmed that finding.

Petitioners' argument on this issue consists of one paragraph and asserts (1) that the "crime-fraud exception" applies because the document was intended to "prevent workers from questioning Union Carbide procedures", and/or (2) that the privilege was "lost" when the document was "shared" with the Atomic Energy Commission.[18] Both arguments were considered and rejected by the courts below:

> [P]laintiffs in making their argument mischaracterized the content of the [document]. . . . [P]laintiffs have demonstrated no relationship between the Harwell communication and the fraud alleged by plaintiffs. . . . In sum, there is no merit to plaintiffs' contention that the Harwell document is excepted from the attorney-client privilege by the crime-fraud exception.
>
> * * *
>
> [U]nder the terms of the operating contract all records related to Union Carbide's operation of the Paducah Plant were the property of the federal government and had to be retained or disposed as the Department of Energy directed . . . [T]he contractual relationship created a "common interest" between Union Carbide and the government whereby confidential communications are clearly privileged[19].

Petitioners advance no reasons why either of those conclusions was erroneous.

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18. *Petition* at p. 30.

19. **Memorandum and Order** (Jt. App. 370) at 5-6, 9.

CONCLUSION

Petitioners' have not presented a "compelling reason" why the Court should issue a writ of certiorari. Their *Petition* should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX

RELEVANT STATUTORY PROVISIONS

A. Provisions of the Price-Anderson Act, as Amended

1. 42 U.S.C. § 2014 provides in relevant part:

§ 2014. Definitions

The intent of Congress in the definitions as given in this section should be construed from the words or phrases used in the definitions. As used in this chapter:

* * *

(e) The term "byproduct material" means (1) any radioactive materials (except special nuclear material) yielded in or made radioactive by exposure to the radiation incident to the process of producing or utilizing special nuclear material, and (2) the trailing or wastes produced by the extraction or concentration of uranium or thorium from any ore processed primarily for its source material content.

* * *

(q) The term "nuclear incident" means any occurrence, including an extraordinary nuclear occurrence, within the United States causing, within or outside of United States, bodily injury, sickness, disease, or death, or loss of or damage to property, or loss of use of property, arising out

of or resulting from the radioactive, toxic, explosive, or other hazardous properties of source, special nuclear, or byproduct material. . . .

* * *

(w) the term "public liability" means any legal liability arising out of or resulting from a nuclear incident or precautionary evacuation (including all reasonable additional costs incurred by a State, or a political subdivision of a State, in the course of responding to a nuclear incident or a precautionary evacuation), except: (i) claims under State or Federal workmen's compensation acts of employees of persons indemnified who are employed at the site of and in connection with the activity where the nuclear incident occurs; (ii) claims arising out of an act of war; and (iii) whenever used in subsections (a), (c), and (k) of [42 U.S.C. § 2210], claims for loss of, or damage to, or loss of use of property which is located at the site of and used in connection with the licensed activity where the nuclear incident occurs. "Public liability" also includes damage to property of person indemnified: *Provided*, That such property is covered under the terms of the financial protection required, except property which is located at the site of and used in connection with the activity where the nuclear incident occurs.

* * *

(z) The term "source material" means (1) uranium, thorium, or any other material which is determined by the Commission pursuant to the provisions of [42 U.S.C. § 2091] to be source material; or (2) ores containing one or more of the foregoing materials, in such concentration as the Commission may by regulation determine from time to time.

(aa) The term "special nuclear material" means (1) plutonium, uranium enriched in the isotope 233 or in the isotope 235, and any other material which the Commission, pursuant to the provisions of [42 U.S.C. § 2071], determines to be special nuclear material, but does not include source material; or (2) any material artificially enriched by any of the foregoing, but does not include source material.

* * *

(hh) The term "public liability action", as used in [42 U.S.C. § 2210],-means any suit asserting public liability. A public liability action shall be deemed to be an action arising under [42 U.S.C. § 2210], and the substantive rules for decision in such action shall be derived from the law of the State in which the nuclear incident involved occurs, unless such law is inconsistent with the provisions of such section.

Appendix

2. 42 U.S.C. § 2010(n)(2) provides in relevant part that:

> With respect to any public liability action arising out of or resulting from a nuclear incident, the United States district court in the district where the nuclear incident takes place, or in the case of a nuclear incident taking place outside the United States, the United States District Court for the District of Columbia, shall have original jurisdiction without regard to the citizenship of any arty or the amount in controversy. Upon motion of the defendant to of the Commission or the Secretary, as appropriate, any such action pending in any State court . . . or United States District court shall be removed or transferred to the United States district court having venue under this subsection. Process of such district court shall be effective throughout the United States. In any action that is or become removable pursuant to this paragraph, a petition for removal shall be filed within the period provided in section 1446 of title 28, Untied States Code. . . .

Appendix

B. Provisions of the Kentucky Workers' Compensation Act

1. KRS § 342.690(1) provides in relevant part:

> If an employer secures payment of compensation as required by this chapter, the liability of such employer under this chapter shall be exclusive and in place of all other liability of such employer to the employee . . . at law or in admiralty on account of such injury or death.

2. KRS § 342.610(4) provides in relevant part:

> If the injury or death results to an employee through the deliberate intention of his employer to produce such injury or death, the employee or his dependents may take under this chapter, or in lieu thereof, have a cause of action at law against the employer as if this chapter had not been passed . . .